No. 17502

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GRUNWALD-MARX, INC.,

Appellant,

vs.

LOS ANGELES JOINT BOARD, AMALGAMATED CLOTHING WORKERS OF AMERICA, an unincorporated voluntary association,

Appellee.

APPELLEE'S REPLY BRIEF.

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Statement of Case.

The Appellee herein, the Los Angeles Joint Board, Amalgamated Clothing Workers of America, AFL-CIO, is a labor organization representing employees in an industry affecting interstate commerce as defined in the Labor Management Relations Act of 1947, as amended. The Appellant, Grunwald-Marx, Inc., is an Employer engaged in operations affecting interstate commerce within the meaning of said Act [Tr. 13] and was a party to a collective bargaining agreement with Appellee [Tr. 19, *et seq.*].

The amended complaint herein seeks to compel the Appellant specifically to perform its agreement with the Appellee to submit to arbitration all grievances, complaints or disputes arising between them which relate directly or indirectly to the provisions of their collective bargaining agreement [Article 14, Tr. 27].

The sole remedy sought by the Appellee, granted by the Court below, is to compel the Appellant to proceed to arbitration concerning those grievances raised by the Appellee. These grievances are based upon Articles 15 [Tr. 28] and 17 [Tr. 29] of the Agreement, in that Appellant by closing its plants in Los Angeles and Long Beach, California, and moving them to Phoenix, Arizona, violated these provisions. While it is true that Appellee had previously filed an action in the Los Angeles Superior Court, subsequently upheld by the California Supreme Court, to compel arbitration of certain other grievances, namely the failure to pay vacation and holiday pay in 1957, under Articles 9 and 11 of said agreement the merits of those grievances are in no way involved in the instant action.

Other than has been noted Appellee is in general agreement with the Statement of Jurisdiction and Statement of the Case as contained in Appellant's brief.

Question Presented.

1. Did the District Court correctly decide that the Federal substantive law of arbitration requires that a party signatory to a collective bargaining agreement providing for the arbitration of all disputes relating to the provisions of the agreement must proceed to arbitration and present all arguments on the merits and alleged defenses to such disputes to the arbitrator?

ARGUMENT.

Summary of Argument.

In seeking to deny to Appellee its contractual right to have arbitration of disputes and grievances which exist between the parties, Appellant completely misconstrues the nature of this action. As a result of this failure to comprehend the purpose, scope and effect of the instant proceeding, Appellant cites decisions of this and other courts, the facts and holdings of which are totally unrelated to the case at bar.

This action is simply and solely one to compel specific performance of the agreement between the parties to submit to arbitration all complaints, grievances or disputes arising between them which relate directly or indirectly to the provisions of a collective bargaining agreement.

The collective bargaining agreement involved herein imposed upon Appellant the obligation to manufacture garments only in its own factories covered by the said agreement unless and until the employees in such factories were first supplied with work [Article 17, Tr. 56]; the obligation not to lock out these employees [Article 15, Tr. 55]; and the obligation to arbitrate grievances, complaints and disputes relating thereto which could not otherwise be settled with Appellee [Article 14, Tr. 54-55].

Appellee contends that Appellant has manufactured garments in plants other than its own, as defined by the collective agreement, without first supplying work to its employees covered thereby, all in violation of Article 17 thereof. Appellant says that it has not done so and seeks to sustain this position upon its own interpretation of the substantive provisions of the contract. Appellee

further contends that Appellant by closing its Long Beach and Los Angeles, California, factories and moving its manufacturing operations to Phoenix, Arizona, has locked out its employees in violation of the terms of the collective bargaining agreement. Appellant also denies this contention. Thus, there exist grievances and disputes between the parties arising under the collective bargaining argument which cannot be settled short of arbitration. Appellee then called upon Appellant to fulfill its obligation to resolve these grievances and disputes by the method provided in the collective bargaining agreement, namely, arbitration. This Appellant refused to do. It is for this last act by Appellant, the refusal to proceed to arbitration, and none other that Appellee sought relief from the court below. All questions relating to the merits of these disputes are not relevant to this action.

Questions relating to loss of wages, including fringe benefit income to the employees or loss of dues income to the union as a result of the claimed breach by the Appellant of Articles 15 and 17 of the Agrement are merely measures of damages which may or may not be levied by the arbitrator, after he and he alone, has determined the merits of these grievances. This Court is called upon by Federal substantive law, to determine but two issues in this action:

1. Can it be said "with positive assurance" that the parties *have not* contracted to submit to the arbitrator the questions of contract interpretation and violation sought to be arbitrated?[1]

2. Has the Appellant refused to proceed to arbitrate such issues?

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[1]*United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U. S. 574, 582-583 (1960).

We submit that this Court must find in the negative on the first issue and in the affirmative on second issue, and must therefore sustain the judgment of the District Court.

I.

The Nature and Scope of the Instant Action and the Law to Be Applied Thereto Compel an Order Directing Appellant to Arbitrate the Matters in Dispute Between It and the Appellee.

This is an action brought by Appellee, a trade union representing workers employed in a business affecting interstate commerce, to compel arbitration pursuant to a collective bargaining agreement between that union and Appellant, the employer. This action was brought under the provisions of Section 301(a) of the Labor-Management Relations Act of 1947. 61 Stat. 136, 29 U. S. C. 185. The Supreme Court of the United States and the U. S. Courts of Appeal have not only clarified the nature and scope, as well as the relief which can be granted in such an action, but have defined and limited the function of the courts in such a proceeding.

In an action such as this, a plaintiff can obtain but one remedy to cure a violation of an undertaking to arbitrate grievances or disputes arising under a collective agreement, and that is specific performance of that undertaking. *Textile Workers v. Lincoln Mills of Alabama,* 353 U. S. 448. As the Supreme Court said in *Goodall-Sanford, Inc. v. United Textile Workers of America,* 353 U. S. 550, 551 in considering the nature of an action to compel arbitration:

"The right enforced here . . . is not merely a

step in judicial enforcement of a claim nor auxiliary to a main proceeding, *but the full relief sought.*" (Emphasis supplied).

In these circumstances, where a party to a collective bargaining agreement brings an action to remedy a breach of the agreement to arbitrate, the court may only examine the alleged breach of the contract to arbitrate, and no other. *United Steel Workers v. American Mfg. Co.* 363 U. S. 564; *United Steelworkers v. Warrior & Gulf Nav. Co., supra.*

The instant cause of action accrued upon the refusal of the Appellant to proceed to arbitration. *R. F. C. v. Harrisons & Grosfield, Ltd.* (C. A. 2, 1953), 204 F. 2d 366, Cert. denied 346 U. S. 854. It, therefore, only required a judicial determination by the court below that the contractual obligation to arbitrate existed. As such the decree of the court below ordering enforcement of the arbitration provision in the collective bargaining agreement is correct and must be sustained. *Goodall-Sanford, supra; Item Company v. New Orleans Newspaper Guild* (C. A. 5, 1958), 256 F. 2d 855, cert. denied 358 U. S. 867. This is the sole thrust of this action.

In reaching its decision upon the Appellee's claim of an unjustified refusal by Appellant to comply with a demand for arbitration, the court below applied the federal substantive law of arbitration demanded by the U. S. Supreme Court in *Lincoln Mills, supra.* This federal substantive law has limited the function of a Federal Court in a proceeding such as this to the determination of the following issues, and the following issues alone:

1. Can it be said "with positive assurance" that the parties *have not* contracted to submit to the arbitrator the questions of contract interpretation and violation sought to be arbitrated?

2. Has the Appellant refused to proceed to arbitrate such issues?

The United States Supreme Court has held that courts "have no business weighing the merits of the grievance."

So too in its adjudication of these issues, this Court must avoid any consideration or determination of the merits of the claims upon which arbitration is sought, *United Steelworkers v. American Mfg. Co., supra,* and must defer to the arbitrator any defenses which might be proffered in avoidance or mitigation of the merits of those controveries, *R. F. C. v. Harrisons & Grosfield, supra.*

II.

Appellee Seeks to Arbitrate Claims Which on Their Face Are Governed by the Agreement, and Appellant Has Refused to Perform That Agreement.

Appellant - manufacturer - and Appellee - trade union - are not legal strangers, having maintained a contractual relationship for many years. In fact, the last complete collective agreement between the parties had been negotiated for a three year term in 1953 [Tr. 19, 31], which Agreement, with but slight modification not germane to the instant proceeding, had been extended for an additional three year term ending September 30, 1959 [Tr. 32-33].

In bringing this action to compel specific performance of the agreement to arbitrate, Appellee set out two matters in dispute between the parties, both arising by virtue of Appellant's breach of specific terms of that collective bargaining agreement. The grievances as stated in the amended complaint, in essence are:

> (a) Since on or about April 10, 1957, and continuously thereafter, up to and including September 30, 1959 (the expiration date of the collective bargaining agreement), the Appellant manufactured and caused to be manufactured garments in violation of Article 17 of the collective bargaining agreement;
>
> (b) On or about May 29, 1957 Appellant did lock out its employees covered by the terms of the collective bargaining agreement at its plants located in Long Beach and Los Angeles, Calif. and did continuously thereafter, up to and including September 30, 1959 maintain said lockout, in violation of Article 15 of the agreement.

The agreement to arbitrate is broad in scope and is neither restricted by any time limitations nor procedural requirements as to the form or manner in which complaints or disputes requiring arbitration are to be processed. It provides as follows [Article 14, Tr. 27-28]:

> "All complaint, (sic) grievance or dispute arising between the parties relating directly or indirectly to the provisons of this agreement whether concerning discharges or any other terms thereof shall in the first instance be taken up for adjustment by a representative of the Union and a representative of the Company. In the event that they are unable to adjust the same, then such matters shall be submitted to arbitration. . . ."

Thus, at all times during which the breaches which Appellee seeks to arbitrate occurred there was in effect an agreement between the parties imposing upon them an obligation to arbitrate those matters in dispute between them arising from the terms of that Agreement which they could not resolve otherwise. The matters in dispute herein are clearly embraced by that obligation to arbitrate. Faced with the impossibility of resolving disputes with Appellant relating to the terms of the agreement by means other than arbitration, Appellee demaned that the existing disputes which had arisen by virtue of Appellant's acts during the term of the agreement be submitted to arbitration. This demand for arbitration was made September 30, 1960 [Tr. 92-93]. By letter of its attorney dated October 13, 1960, Appellant refused to arbitrate the matters set forth in Appellee's demand [Tr. 94]. Since the Appellee's right to arbitrate is not limited to demands for arbitration made during the life of the contract, the obligation to arbitrate has in no way been extinguished. *General Tire and Rubber Co. v. Local No. 512, United Rubber Workers* (C. A. 1, 1961), 294 F. 2d 957, 49 L. R. R. M. 2004, affg. (D. R. I.-1961) 191 Fed. Supp. 911, 49 L. R. R. M. 2001.

In its effort to obfuscate the true nature of Appellee's claim for relief in the instant proceeding, namely a judicial remedy for Appellant's refusal to abide by its obligation to arbitrate and no more, Appellant has raised asserted defenses to the merits of the disputes set forth in III, *infra,* which do not bear on the cause of action herein. Further, Appellant would have this Court reverse the court below on its specious assertion that the claims are "frivolous". This reliance by Appellant on an attack upon the merits of

the grievances merely demonstrates its misconception of the nature of this action and the function of this Court. Appellant is apparently unaware that it is threshing about in the dark ages of Federal arbitration law for, as the U. S. Supreme Court has said:

> "The collective agreement calls for the submission of grievances in the categories which it describes, irrespective of whether a court may deem them to be meritorious.
>
> * * *
>
> "The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those the court will deem meritorious. The processing of even frivolous claims may have therapeutic values of which those who are not a part of the plant environment may be quite unaware." *United Steelworkers v. American Mfg. Co.,* 363 U. S. 564, 567-568.

In thus raising as a defense to this action the merits of grievances which Appellee seeks to arbitrate not only does Appellant raise matters which are extraneous to the case at bar, but matters which upon even casual examination explode in Appellant's face.

The first of Appellee's two grievances arises from Appellant's manufacture of garments in its wholly owned plant in Phoenix, Arizona. The collective agreement provides, *inter alia,* in Article 17 [Tr. 29]:

> "Other Factories: During the term of this Agreement the Company shall not, without the

consent of the Union, directly or indirectly manufacture garments or cause them to be manufactured in any factory other than its own factories unless its employees in its own factories are first supplied with work."

The facts as to this grievance are not in dispute. At the time the parties entered into the collective agreement, Appellant had but two factories, those in Long Beach and Los Angeles, California. By letter dated November 21, 1956 signed by its president, Appellant limited the coverage of the collective bargaining agreement to the employees in those two factories [Tr. 34]. After Appellant closed its factories in Long Beach and Los Angeles it continued to manufacture garments, but in a third factory located in Phoenix, Arizona, a factory specifically excluded from the coverage of the contract between the parties by virtue of Appellant's letter of November 21, 1956. Appellant not only admits that it owns and operates the Phoenix factory [Tr. 35, par. I] but relies upon such ownership in defense of Appellee's assertion that the manufacture of garments at that factory constitutes a violation of Article 17 in the face of the shutdown of the two plants admittedly covered by the collective agreement.

Thus, the nexus of this dispute lies in the interpretation of Article 17 of the collective agreement and the application of the proper interpretation of that clause to the facts.

Since this grievance directly or indirectly involves an interpretation of the terms of the agreement and the application of the facts thereto, it clearly falls within the scope of Article 14 thereof which states that "All . . . grievance[s] . . . relating directly or indirectly to

the provisions of this agreement . . . shall be submitted to arbitration [Tr. 27].

The second grievance asserted by Appellee also may be resolved only by interpretation of a contract clause. Article 15 of the collective agreement provides:

> "Strikes and Lockouts: During the period of this Agreement there shall be no general lockout, general strike, individual shop strike, shop or union meetings called during working hours, or shop stoppage for any reason or cause whatsoever, and there shall be no individual lockout, strikes or stoppage pending the determination of any complaint or grievance.
>
> "Should there be a stoppage of work in the factory of the Employer, immediate notice thereof shall be given by the Employer to the Union. The latter obligates itself to return the workers to their work immediately upon notification of such stoppage. The consideration of stoppage and lockout cases shall have precedent over or shall be considered simultaneously with complaints or grievances." [Tr. 28].

Appellee asserts that Appellant by closing its plants in Long Beach and Los Angeles during the contract term and transferring its manufacturing operations to its own wholly-owned factory in Phoenix, which factory was not covered by the terms of the collective bargaining agreement, and at a time when Appellant was attempting to secure a lower wage structure for its operations in California was a lockout within the meaning of Article 15 of the collective agreement.

Again, the parties are locked in a dispute which can be resolved only by interpretation of the contract between them. In such a posture

> "The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is then confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for." *United Steelworkers v. American Mfg. Co. supra,* at pp. 567-568.

On the other hand, Appellant claims that the union's grievance is ". . . a completely frivolous claim buttressed only by the language of the Supreme Court in the *United Steelworkers* case . . ."[2] (App. Br. pp. 11-12).

In one of these cases *Warrior & Gulf Navigation, supra,* the Company laid off some employees covered by the agreement due in part to the fact that it had contracted out certain maintenance work done by these employees. The contract as in the case at bar, contained both a no strike and no lock-out provision, and also as in the instant case, had a broad arbitration clause calling for the arbitration of differences as to the "meaning and application" of the collective agree-

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[2]Referring to the *American Mfg. & Warrior & Gulf Navigation* cases, *supra.*

ment as well as "any local trouble of any kind" that should arise. It, however, contained a provision, totally absent from the contract in question herein, which provided that "matters which are strictly a function of management shall not be subject to arbitration". Yet, the Supreme Court directed arbitration holding that any doubts as to subject matter to be arbitrated should be resolved in favor of coverage.[3]

A fortiori, a termination of employment resulting from a transfer of work from the bargaining unit covered by the collective agreement, to a unit not so covered is an arbitrable claim under an arbitration provision which is not only as broad in its scope as that which was contained in the *Warrior & Gulf* agreement, but fails to contain restrictions of any kind as to the arbitrability of any decision made by management, whether a function of management, or not.[4] Indeed, if anything can be said with "positive assurance"

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[3]See also *United Steelworkers v. American Mfg. Co., supra,* which involved an arbitration clause, to all intents and purposes indistinguishable from that involved herein, where the United States Supreme Court held that arbitration was not barred where an employee who had been refused reinstatement had accepted a workmens compensation settlement on the basis of a permanent disability and thereafter claimed seniority rights, despite the fact that contract also contained a "management rights" clause which reserved to the Company the power to suspend or discharge any employee for "cause." The arbitration clause in the *American Mfg. Co.* case reads:

> "Any disputes, misunderstandings, differences of grievances arising between the parties as to the meaning, interpretation and application of the provisions of this agreement, which are not adjusted as herein provided, may be submitted to the Board of Arbitration for decision . . ."

[4]See also *Sidele Fashions,* 133 N. L. R. B. No. 49 where the Board for the purposes of the National Labor Relations Act found similar conduct for a similar motive to constitute a lockout for the purposes of that statute.

it is that the parties hereto have actually contracted to submit the subject matter herein to arbitration, thus meeting a more stringent test than is demanded by the U. S. Supreme Court in determining the issue of arbitrability.

In short, the threshold issues to a court decree directing arbitration in this action have been more than met:

(1) The parties hereto have contracted to resolve all questions of interpretation and violations of the collective agreement to arbitration; (2) Appellant, after a request therefor by Appellee has reneged on its obligation to do so; and (3) the claims raised by Appellee are on their face governed by the contract. Hence, the order of the court below directing arbitration of those disputes must be sustained.

III.

Appellant's Defenses to This Action Are Without Merit, as They Are Based on a Misconception of the Nature of the Cause of Action Herein.

As a further demonstration of its failure to comprehend the gravamen of this action, Appellant raises affirmative defenses and relies upon state and federal court decisions which have no bearing upon the federal substantive law of labor arbitration to be applied herein.

A. In This Action to Remedy a Specific Breach of the Agreement to Arbitrate, Other Lawsuits to Remedy Other Breaches of This Agreement Cannot Give Rise to a Defense of Splitting of a Cause of Action.

From the foregoing analysis, it is clear that this suit under Section 301(a) of the Labor-Management Relations Act of 1947, asserts a claim for relief engendered by a refusal to comply with a contractual obligation to

arbitrate, and arises solely from the Appellant's refusal to so arbitrate. It is equally clear that the claim for relief for such refusal to arbitrate is independent of, *Point I, supra,* and unrelated to the disputes upon the merits of which arbitration is required. *R. F. C. v. Harrisons & Grosfield, Ltd., supra.*

Neither the subject matter of the breaches which are to be arbitrated, the manner in which they occurred or the time when they occurred, are in any way circumscribed by the agreement to arbitrate. Hence, it was only

> ". . . when the agreement was breached, [that] the union's cause of action to specifically enforce the agreement to arbitrate arose and continued unaffected by time until the breach of it was determined and compliance with it ordered."
>
> *Item Company v. New Orleans Newspaper Guild, supra.*

The specific breach of the agreement to arbitrate occurred in October 1960 [Tr. 94]. Nevertheless, Appellant asserts that Appellee has split its cause of action by bringing this action to remedy Appellant's breach herein after Appellee successfully prosecuted an action in the courts of the State of California for an entirely separate breach of the agreement to arbitrate, which different breach occurred in 1957. Appellant does not comprehend that its breach of the agreement to arbitrate in 1957, when the Appellee sought to arbitrate Appellant's refusal to pay accrued vacation and holiday pay to its employees in violation of Articles 9 and 11 of the collective agreement gave rise to one cause of action, and that its refusal in 1960, to abide by its con-

tractual obligation to arbitrate its violation of Articles 15 and 17 of the Agreement, by manufacturing garments in a factory not covered by the terms of the collective agreement, and locking out its employees, gives rise to a second and distinct cause of action. Each refusal to arbitrate is independent of the other and each gives rise to a separate and distinct claim for relief. *Goodall-Sanford, Inc. v. United Textile Workers, supra; R.F.C. v. Harrisons & Grosfield, supra; Item Company v. New Orleans Newspaper Guild, supra.* Each action seeks relief from entirely different breaches of the agreement to arbitrate, which breaches arise not only at different times, but are also bottomed on grievances arising from distinct and separate sections of the collective agreement. Thus, there are two distinct claims for relief, and there is no splitting of a cause of action.

In a further effort to buttress its asserted defense that Appellee split one cause of action, Appellant cites the decision of this Court in *Shatte v. International Alliance,* 182 F. 2d 158. That case involved an action by individual employees for a breach of their individual contracts of employment. This Court properly held that the cause of action for breach of the employee's contract of employment accrued in its entirety when the individual employee was discharged in violation of his own contract of employment and that a second cause of action therefor did not lie. Appellee has no argument with the general rule that an employee so discharged may sue only once and at that time recover all present and prospective damages. We cannot, however, see where the rule of the *Shatte* case, or any other similar authority relied on by Appellant has any connection with the case at bar. The instant proceeding is not an action

for wages; it is not an action to enjoin a lockout or recover damages therefor; nor is it an action to require Appellant to manufacture its garments in plants covered by the collective agreement; however, it is an action which seeks solely to secure for Appellee the judgment of an arbitrator on the merits of those questions. It was the arbitrator's judgment and all that it connotes that was bargained for and promised in the agreement sued upon. *United Steelworkers v. American Mfg. Co. supra.* Indeed, if Appellant was serious in its contention that this proceding is nothing more, nor less, than an action brought by Appellant for wages, including vacation and holiday pay, owed by Appellant to its employees[5] as a result of its breach of the collective agreement, then it most certainly would have at least cited *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.,* 348 U. S. 437 (1955), in its brief to this Court, and emphasized its fifth affirmative defense,[6]

> "that [Appellant], has no powers or legal capacity to demand . . . wage claims for individual employees, since claims for wages are a uniquely personal right to each individual employee arising out of contracts of hire which are separate and apart from the collective bargaining agreement." [Tr. 37-38].

This, it failed to do, because the *Westinghouse* rule is not applicable to an action to compel arbitration pursuant to Section 301 of the Labor Management Relations

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[5]App. Brief, pp. 5, 8.

[6]The sole reference made by Appellant to this defense is in page 4 of its Brief (Statement of Facts), where it sets out all of the affirmative defenses raised by it in its Answer.

Act of 1947, inasmuch as the right here being sought to be enforced is one peculiar to the Appellant-employer and Appellee-union, the contracting parties, and not to the individual employees; that right is the enforcement of the agreement to arbitrate, which Appellant has breached, none other.

B. Appellant's Asserted Defenses of Res Judicata, Collateral Estoppel, Waiver and Laches, Cannot Bar This Action and, if Anything, Serve to Support the Judgment of the Court Below.

As a further defense to this action, Appellant relies upon the judgment of the Supreme Court of California that held that Appellant upon a separate and prior occasion improperly breached its obligation to arbitrate a question arising under distinct and different provisions of the Agreement, namely Articles 9 and 11. Yet, Appellant asserts that that judgment of the state court in that different cause of action constitutes *res judicata* or a collateral estoppel of the case at bar.

The Supreme Court of California in *Jerome Posner, as Manager of Los Angeles Joint Board, Amalgamated Clothing Workers of America v. Grunwald-Marx, Inc.*, 56 A. C. 159, 363 P. 2d 313 (1961), held that Appellant, defendant in that action, had breached its agreement with Appellee to arbitrate by refusing to submit to arbitration the issue of accrued vacation and holiday pay earned by Appellant's employees for the year 1957, under Articles 9 and 11 of said agreement. The issues before the highest Court of California in that case were: the existence of an agreement between the parties to arbitrate; a refusal by the Defendant (Appellant herein) to proceed to arbitration when so requested by Plaintiff (Appellee herein) in 1957; and, whether the claims in

that case which the Plaintiff wished to arbitrate were on their face governed by the contract. The California court found for Plaintiff in that action, on all issues, and entered a final judgment of that cause of action, by ordering arbitration for that specific breach of the agreement to arbitrate.

Since the cause of action herein is based upon a different claim for relief, the judgment of the court in *Posner v. Grunwald-Marx, supra,* cannot be *res judicata* so as to bar prosecution of this proceeding by Appellee. In *Cromwell v. County of Sac,* 94 U. S. 681 the United States Supreme Court defined the thrust of *res judicata* in holding that a judgment upon the merits in a first action bars the subsequent prosecution of a second action based upon the same claim for relief. The Supreme Court therein held that a judgment on the merits was not only an absolute bar against a subsequent suit on the same cause of action, but also barred the parties on every matter which was offered or received to sustain or defeat the claim for relief in the first action as well as every other admissible matter which might have been offered for that purpose. Under this definition of *res judicata,* as set forth by the United States Supreme Court, the judgment of the California Supreme Court upon the cause of action therein asserted cannot be *res judicata* of the different cause of action asserted herein.

Similarly, the judgment of the California Supreme Court in *Posner v. Grunwald-Marx, supra,* cannot act as a collateral estoppel of the cause of action herein. In *Cromwell v. County of Sac, supra,* the United States Supreme Court also held that where there is a second action between parties upon a different claim

for relief, the judgment in a prior action between the parties operates as an estoppel only as to those matters in issue or points controverted in the prior action, upon the determination of which the finding or verdict was rendered. Where, as in the case at bar, it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be to the point or question actually litigated and determined in the original action, not what might have been litigated and determined. Only upon such matters is the judgment in the first action conclusive in the second. *Cromwell v. County of Sac, supra.*

Applying this directive of the United States Supreme Court to the instant proceeding, we find that the issue of Appellee's demand for arbitration in 1960 was not litigated in the California state court action. Hence, the judgment therein does not estop determination of that issue in this proceeding. We also discover that the question of whether it can be said with "positive assurance" that the claims which Appellee seeks to have arbitrated, are not governed by the contract (breaches of the agreement to manufacture garments only in plants covered by the terms of the collective agreement and the locking out of the employees,) was not litigated in the state court action, and therefore the judgment therein does not estop determination of these issues in this proceeding. And, we further discover that the California state court based its determination upon a finding that the arbitration clause constituted an agreement between the parties providing for "a complete system of industrial self-government" covering all disputes between the parties. *Posner v. Grunwald-Marx, supra.* Therefore, the principle of collateral estoppel,

raised as a defense to this action, boomerrangs, and estops Appellant from questioning the scope of the arbitration agreement, it already having been judicially determined to encompass all disputes between the parties.

In like measure, the judgment of the California Supreme Court estops Appellant from asserting a defense of waiver to Appellee's effort to obtain arbitration of the lock-out claim. Relying upon one sentence of Article 15 of the collective agreement, which sentence Appellant has lifted out of context, Appellant urges that its interpretation of that sentence demonstrates that Appellee has waived its right to arbitrate the lock-out issue (Appellant's Br. p. 16). This defense, however, must fall on two grounds. First, since this defense rests upon an interpretation of contract language, it is for the arbitrator and the arbitrator alone to determine the effect of this contract language, for it was the judgment of the arbitrator which was bargained for by the parties, *United Steelworkers v. American Mfg. Co., supra.* Although no counterinterpretation is necessary, it should be pointed out that Article 15 as a whole deals with strikes and lock-outs, and the one sentence that Appellant seeks to interpret, merely emphasizes that in the event that either situation occurs, it shall receive priority over, or simultaneous treatment with, other grievances then raised or pending and unresolved. Such is not the case herein.

Second, by its own reasoning and on the basis of the law invoked by Appellant, it is estopped from raising the defense of waiver since the California Supreme Court found in *Posner v. Grunwald-Marx, supra,* that waiver is a question of fact which gets into the merits of the matter to be arbitrated, the determination of which is for the arbitrator, and not for a court.

So too, the distinction between the defenses which apply to this action based upon Appellant's breach of the agreement to arbitrate, and possible defenses which Appellant may have to the claims which Appellee seeks to arbitrate, sustain the judgment of the court below in denying Appellant's asserted defense of laches. As stated before, this Court has before it only the issues pertaining to Appellant's refusal to abide by its obligation to arbitrate in 1960. The cause of action for breach of the obligation to arbitrate accrued when Appellee asked Appellant to arbitrate the disputes between them and Appellant refused to do so. Since the instant action was brought within the period fixed by the statute of limitations, the Appellant's plea of laches must show extraordinary circumstances to exist which require the doctrine to be applied. Appellant herein asserted as such extraordinary circumstances that it would be required to retain counsel and pay reasonable counsel fees in defense of this action and on this specious ground would have had the court below invoke the doctrine of laches. The District Court correctly found that Appellant had not sustained the burden of proving extraordinary circumstances as to make inequitable the granting of relief to Appellee from Appellant's breach of the agreement to arbitrate, and hence, it properly denied this defense. *R. F. C. v. Harrisons & Grosfield, Ltd., supra; International Association of Machinists v. Hayes Corp.* (C. A. 5, 1961), ... F. 2d ....., 49 L. R. R. M. 2210.

Conclusion.

The Federal substantive law of arbitration is applicable to the instant case. This law as enunciated by the United States Supreme Court, limits this Court to the consideration of two issues, namely:

1. Can it be said "with positive assurance" that the parties *have not* contracted to submit to the arbitrator the questions of contract interpretation and violation sought to be arbitrated?

2. Has one party, the Appellant herein, refused to proceed to arbitrate such issues?

The collective bargaining agreement herein provides, that all disputes between the parties relating directly or indirectly to the provisions of the agreement shall be submitted to arbitration [Article 14, Tr. 27].

This is an all-inclusive submission of all questions of contract interpretation to the judgment of the arbitrator within the meaning of the Federal substantive law of arbitration. There are no exceptions or limitations on this submission, and hence, as a matter of fact, it can be stated with "positive assurance" that Appellant herein has actually contracted to submit the questions of contract interpretation involved herein to arbitration. There are no doubts which remain to be resolved in favor of coverage.

This Court, under the mandate of the United States Supreme Court, has no concern with the appellant's arguments concerning the merits of the underlying grievances nor any of the alleged defenses thereto.

The sole remedy sought by the instant action is to compel the Appellant to abide by its agreement to arbitrate disputes arising directly, or indirectly, under the terms of the said agreement. This remedy then is di-

rected solely to Appellant's refusal to arbitrate these differences. This refusal occurred on October 13, 1960 [Tr. 94], and the Court below properly ordered the Appellant to remedy its breach by proceeding to arbitrate.

Wherefore, it is respectfully submitted that the judgment of the Court below is correct and should be affirmed.

Respectfully submitted,

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